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## THE UTILITY OF RECKLESSNESS

WILLARD D. LORENSEN\*

The emergence of the Model Penal Code has been the dominant development of substantive criminal law in recent decades. Mixed with the magic elixir of funds from the now defunct Law Enforcement Assistance Administration, the Code influenced major revisions of the criminal laws of thirty-four states.<sup>1</sup> It also had a major impact on early versions of the continuing and thus far ineffective efforts to produce a new federal criminal code.<sup>2</sup> West Virginia has drafted, and redrafted, a new criminal code based upon the American Law Institute model, but the lack of organized support has left such revisions in a state of limbo. One of the losses of this failed effort is the focal point of this essay. The concept of recklessness as the standard baseline for criminal intent or *mens rea*, advanced in the Model Penal Code,<sup>3</sup> has much to commend it. Failure to embrace that concept has its costs. Recklessness has utility.

Crimes are generally assumed to require an intention or desire to achieve the end forbidden by law. West Virginia's statutes on general crimes use a variety of terms that reinforce this notion. The terms "maliciously,"<sup>4</sup> "unlawfully,"<sup>5</sup> "intentionally,"<sup>6</sup> "feloniously,"<sup>7</sup> "knowingly,"<sup>8</sup> and "wilfully and maliciously"<sup>9</sup> turn up in these provisions. The prevalence of these kinds of statutory descriptions of criminal intent suggests that in all but a few exceptional situations crimes require a state of mind in which the actor desires to cause the harm forbidden by law. But this view of criminal intent is essentially inaccurate, according to the drafters of the Model Penal Code.<sup>10</sup> A reckless in-

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<sup>1</sup> MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments 1980) Forward xi.

<sup>2</sup> Drinan, *The Federal Criminal Code: The Houses Are Divided*, 18 AM. CRIM. L. REV. 509 (1981). Hopes for a comprehensive revision of the federal criminal law are apparently fading. *News Update*, 69 A.B.A.J. 975 (1983).

<sup>3</sup> MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962).

<sup>4</sup> W. VA. CODE § 61-2-9(a) (Supp. 1983).

<sup>5</sup> *Id.* An "unlawful" felonious assault is one that occurs in response to provocation; a "malicious" assault occurs without provocation. This generally parallels the division between murder and voluntary manslaughter. Lorensen, *Aggravated Assaults in West Virginia*, 62 W. VA. L. REV. 319, 335-36 (1960).

<sup>6</sup> W. VA. CODE § 61-2-9(c) (Supp. 1983). The 1978 modification of this provision added, for the first time in West Virginia, a statutory definition of assault and battery. It apparently was adopted to provide authoritative guidance for magistrates. The provision requires that the actor "unlawfully and intentionally" commit the offense, apparently ruling out the possibility of a reckless battery.

<sup>7</sup> W. VA. CODE § 61-2-12 (1977). The offense is robbery.

<sup>8</sup> W. VA. CODE § 61-2-14(d) (1977). The offense is aiding a kidnap. Such assistance must be "knowingly" rendered.

<sup>9</sup> W. VA. CODE § 61-3-1 (1977). The offense is arson.

<sup>10</sup> Adopting recklessness as the common basis for criminal intent was not viewed as changing matters at all. The following is the comment to the tentative draft of 1955:

difference that the harm will result from the actor's conduct is generally sufficient. That principle is made explicit in the Code. It has importance and it has utility.

Outside the context of the Model Penal Code, the term reckless is used sometimes to emphasize a deviation from due care that is greater than that involved in simple negligence.<sup>11</sup> This suggests a kind of continuum running from prudence to negligence to recklessness. The Model Code employs the concept of negligence but its chief distinction between negligence and recklessness is based upon awareness of risk, not the magnitude of the deviation from the proper standard of care.<sup>12</sup> A person is reckless when he is aware of the risk he is creating, and negligent if he should know that he is creating a risk. The requirement that the actor must be aware of the risk draws this kind of recklessness very close to conduct intending the forbidden result. Sound scholarship has concluded that this state of mind sufficed for general criminal intent at common law,<sup>13</sup> and the drafters of the Model Code deliberately adopted it as the base line of *mens rea* or criminal intent in the Code.

Three recent West Virginia cases illustrate how acceptance of the con-

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Paragraph (3) provides that unless the kind of culpability sufficient to establish a material element of an offense has been prescribed by law, it is established if a person acted purposely, knowingly or recklessly with respect thereto. This accepts as the basic norm what usually is regarded as the common law position. More importantly, it represents the most convenient norm for drafting purposes, since when purpose or knowledge is to be required, it is normal to so state; and negligence ought to be viewed as an exceptional basis of liability.

MODEL PENAL CODE at 127 (Tentative Draft 4, 1955) (citations omitted).

<sup>11</sup> See generally, *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1945) (contrasting "simple negligence" with "reckless and wanton" conduct). See also, R. PERKINS & R. BOYCE, *CRIMINAL LAW* 840-51 (3rd ed. 1982).

<sup>12</sup> In defining both recklessness and negligence, the Code describes the conduct as involving "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) and (d). (Proposed Official Draft 1962).

<sup>13</sup> A notorious case in England has focused considerable attention on the issue and provided an opportunity for Glanville Williams, the preeminent English scholar, to make clear his position on the matter. The case is *Regina v. Morgan* (1976) A. C. 182 (House of Lords), where the question was how to deal with the question of mistake as to consent in a prosecution for rape. Several young airmen claimed they thought they were participating in a strange bout of consensual intercourse with the wife of their noncommissioned officer. Their claim was that he had convinced them that her resistance was a part of a sham that in fact heightened her enjoyment of the episode. Her resistance was real and not a sham. The majority view of the Lords that the defendants must have known there was no consent or must have been reckless in not knowing, raised an uproar. There was bitter criticism of the decision because it rejected the idea that a reasonable person would not have so known. Professor Williams noted that the decision was to be "warmly welcomed" since crimes required "an intention to do the act . . . or at least conscious recklessness . . ." See, *Note on the Controversy over the Morgan Decision*, S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS* (4th ed. 1983) 290-92. Prof. Williams' comments were made in a letter to the *London Times*, May 8, 1975.

cept of recklessness can contribute to a sound and consistent development of criminal law. These cases did not trigger serious judicial discussion of *mens rea* or problems of defining the type of intent necessary for the crimes involved. Rather, the cases simply pose factual situations in the context of existing criminal statutes that illustrate how valuable the concept of recklessness can be. The cases are *State v. Myers*,<sup>14</sup> *State v. Kinney*<sup>15</sup> and *State v. Griffith*.<sup>16</sup> In *Myers*, Justice Neely produced one of those startling changes of direction that give the bar jurisprudential whiplash. In *Kinney*, a *per curiam* opinion seems to imply that a person can accidentally commit a crime with specific intent. In *Griffith*, Justice Harshbarger gave a puzzling endorsement to the recently redrafted bad check laws. None of these cases wrestled seriously with criminal intent issues. Rather, they simply set the stage for consideration of recklessness.

*State v. Myers* involved reckless driving that resulted in two deaths. The issue resolved by the court was whether the defendant could be subjected to two consecutive sentences. Another recent case that had addressed the same issue also involved a defendant named Myers. For convenience, the earlier case of *Myers v. Murensky*,<sup>17</sup> will be referred to as *Myers I*. The latter case will be *Myers II*.

In *Myers I*, the court unanimously ruled that in a prosecution under the so-called "negligent homicide" statute in Chapter 17,<sup>18</sup> a single automobile accident resulting in multiple deaths would constitute a single criminal act, subject to a single criminal penalty. *Myers II* reached the opposite result. Admittedly, the prosecution in *Myers II* was brought under involuntary manslaughter in Chapter 61,<sup>19</sup> and thus might be technically distinguished from *Myers I*. However, an intervening decision that will be noted later,<sup>20</sup> eliminated any practical differences between the two crimes. A plausible, though unstated, reason for the turnabout may be the gap that exists in the homicide law of the state. Unintended killings may be either second degree murder (a serious felony) or involuntary manslaughter (a misdemeanor). An intermediate range felony for unintended killings, such as voluntary manslaughter, appears not to be available under West Virginia law.<sup>21</sup> For unintended killing to be murder, the kind of recklessness must involve a high and imminent risk of death—such as shooting into a house or car where peo-

<sup>14</sup> 298 S.E.2d 813 (W. Va. 1982).

<sup>15</sup> 286 S.E.2d 398 (W. Va. 1982).

<sup>16</sup> 285 S.E.2d 469 (W. Va. 1981).

<sup>17</sup> 245 S.E.2d 910 (W. Va. 1978).

<sup>18</sup> W. VA. CODE § 17C-5-1(a) (Supp. 1983).

<sup>19</sup> W. VA. CODE § 61-2-5 (1977).

<sup>20</sup> See *infra* text accompanying notes 39-40.

<sup>21</sup> See *State v. Duvall*, 152 W. Va. 162, 160 S.E.2d 155 (1968).

ple are known to be.<sup>22</sup> West Virginia's reckless murder cases have involved drunken play with weapons in close proximity to other persons.<sup>23</sup> Reckless murder could also occur in the course of driving an automobile, although reckless speeding along a country highway does not usually meet this standard.<sup>24</sup> Still, involuntary manslaughter seems less than adequate to condemn such unjustified risks to human life. Involuntary manslaughter is punished the same as ordinary battery.<sup>25</sup> To show concern for the blameworthiness of the reckless squander of human life by such foolhardy driving, the court made the driver bear the risk of the number of lives lost. That is a rather chancy way of achieving proportionality of punishments.

West Virginia law on automobile homicide has not evolved—it has meandered. The drastic change in course from *Myers I* to *Myers II* is not the first instance of sudden and unpredictable shifts in direction. Early prosecutions for motor vehicle homicide as involuntary manslaughter began by elaborating the kind of careless conduct that would constitute the crime.<sup>26</sup> Following traditional definitions, the court charted a two-fold, alternative test: involuntary manslaughter could be committed by causing the death of another while committing an unlawful act (the misdemeanor-manslaughter parallel to felony murder) or by committing a lawful act in an unlawful manner. The 1945 case of *State v. Lawson*<sup>27</sup> ruled that "reckless and wanton conduct" was necessary to act in an "unlawful manner."<sup>28</sup> In so ruling, the court

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<sup>22</sup> These are sometimes referred to as "depraved heart" killings. Classic examples are *State v. Banks*, 85 Tex. Crim. App. 165, 211 S.W. 217 (1919) (shooting into the caboose of a train where the actor knew people to be); *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924) (shooting into a room known by the actor to be occupied by several people); *Mayes v. People*, 106 Ill. 306, 290 S.W. 119 (1883) (throwing a heavy beer mug at a woman carrying a lighted oil lamp); *Commonwealth v. Malone*, 354 Pa. 180, 47 A.2d 445 (1946) (voluntarily playing "Russian Roulette" pointing a gun at the head of co-player). See generally W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 541-45 (1972). The "depraved heart" language was early recognized in West Virginia in *State v. Morrison*, 49 W. Va. 210, 38 S.E. 481 (1901). The case involved a deliberate use of force against another but without, it was claimed, an intent to kill. The defendant struck the victim in the head with a metal rasp in claimed self defense. The court ruled intent to kill was not generally necessary for murder.

<sup>23</sup> *State v. Hicks*, 107 W. Va. 418, 148 S.E. 131 (1929); *State v. Cross*, 42 W. Va. 253, 24 S.E. 996 (1896).

<sup>24</sup> For example, a motorist who drives directly at a law officer summoning him to stop for a traffic violation, intending to flee the area regardless of whether the officer can jump out of the way of his accelerating automobile, might be subject to murder prosecution. The Model Code qualifies the recklessness required for murder, as opposed to manslaughter, as a recklessness "manifesting extreme indifference to the value of human life." MODEL PENAL CODE § 210.2(b) (Proposed Official Draft 1962). See, *Hamilton v. Commonwealth*, 560 S.W.2d 539 (Ky. 1978).

<sup>25</sup> Both voluntary manslaughter, W. VA. CODE § 61-2-5 (1977), and battery, § 61-2-9(c) may be punished by a year in jail. There is a difference in a fine that may also be imposed. For manslaughter, it is \$1,000; for battery it is \$500.

<sup>26</sup> *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958); *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1945).

<sup>27</sup> 128 W. Va. 136, 36 S.E.2d 26 (1945).

<sup>28</sup> *Id.* at 148, 36 S.E.2d at 31.

specifically rejected the notion that "simple negligence" would suffice. But the court also noted in *Lawson* that driving in violation of a state law was acting in an "unlawful manner."<sup>29</sup> Thus, the court seemed to imply that driving one mile per hour beyond the speed limit would be driving in an "unlawful manner" even though this would rarely, if ever, constitute reckless or wanton conduct.

Six years after *Lawson*, the West Virginia legislature redrafted and expanded the statutory rules of the road.<sup>30</sup> Part of this 1951 package of legislation was the "negligent homicide" statute which established the standard that a motor vehicle had to be operated "with reckless disregard of the safety of others" in order for the driver to be guilty of the offense.<sup>31</sup> To be guilty of "negligent homicide" one must drive with "reckless disregard." The legislature obviously saw no important distinction between negligence and recklessness in this regard. West Virginia was rather late in adopting this special automobile homicide statute. The first came in Michigan in 1921.<sup>32</sup> The conventional explanation for their need is fear of jury nullification of voluntary manslaughter as a practical tool in cases of reckless automobile homicides. The word "manslaughter" was thought to be too damning for juries to abide; thus the title "negligent homicide."<sup>33</sup>

In the 1958 decision, *State v. Lough*,<sup>34</sup> the court ignored the new negligent homicide statute and its possible preemptive effects, but relied upon the broad rules of the road adopted contemporaneously to affirm an involuntary manslaughter conviction.<sup>35</sup> The court noted that the Code required that "[i]n every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highways in compliance with legal requirements and the duty of all persons to use due care. . . ."<sup>36</sup> The *Lough* case seemed to say that any violation of a statutory traffic regulation that results in a death could be a basis for involuntary manslaughter. This emphasized the "unlawful manner" portion of the *Lawson* decision and eroded the seemingly important rejection of the

<sup>29</sup> *Id.* at 149, 36 S.E.2d at 32.

<sup>30</sup> 1951 W. Va. Acts, ch. 51.

<sup>31</sup> W. VA. CODE § 17C-5-1 (Supp. 1983).

<sup>32</sup> Note, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. CRIM. L. & CRIMINOLOGY 183 (1950).

<sup>33</sup> Robinson, *Manslaughter by Motorists*, 22 MINN. L. REV. 775, 784 (1938).

<sup>34</sup> 143 W. Va. 838, 105 S.E.2d 538 (1958).

<sup>35</sup> The 1951 act which included the negligent homicide provision was a comprehensive piece of legislation. It concluded with a sweeping statement: "The provisions of all acts or parts of acts, or of this Code, which are inconsistent with the provisions of this chapter are hereby repealed to the extent of such inconsistency." W. VA. CODE § 17C-21-2 (Supp. 1983). Prosecuting motor vehicle deaths under voluntary manslaughter after the adoption of the negligent homicide provision could readily be deemed inconsistent with the sweeping terms of chapter 17C.

<sup>36</sup> 143 W. Va. at 842, 105 S.E.2d at 541 (quoting W. VA. CODE § 17-8-18 (1974)).

"simple negligence" test. Further, the "reckless disregard" standard of the new statutory offense was itself disregarded.

Next came *Myers I*<sup>37</sup> and the rule of lenity. Written by Justice McGraw, the opinion was tightly composed. Most jurisdictions treat multiple deaths from single accidents as multiple offenses, noted Justice McGraw. But many of these cases deal with traditional manslaughter and not a special vehicle homicide statute.<sup>38</sup> The legislature must be more precise if it wishes multiple punishments, he wrote. There was no dissent.

Between *Myers I* and *Myers II* came *State v. Vollmer*,<sup>39</sup> a case that eliminated the substantive differences between negligent homicide and involuntary manslaughter by motor vehicle. The opinion by Justice Miller is a model on how to turn bad precedent into good law. A bit of license must be allowed to achieve such worthwhile results. Vollmer pointedly raised a valid challenge to the law as it then stood in the wake of *Lawson* and *Lough*: Why should prosecutors be allowed to prosecute under the less demanding standard of involuntary manslaughter when the legislature had adopted the stricter standard specifically aimed at motor vehicle homicides? Miller's opinion resolves the problem by eliminating the substantive differences between the two crimes—he skirted *Lough* and went to *Lawson*, reinterpreting that puddle of confusion into a pillar of sound policy.<sup>40</sup> As reconstructed, involuntary manslaughter requires the same "reckless disregard of the safety of others" that is the express standard of the negligent homicide statute. *Lawson* had stated two inconsistent standards and *Lough* had reinforced the lesser of the two. *Vollmer*, for all practical purposes, overrules *Lough* and narrows *Lawson* to only its sound base.

Since the substantive differences between the two offenses had been practically eliminated by *Vollmer*, the appellant in *Myers II*<sup>41</sup> seemed to be on solid ground in arguing that whether the prosecution comes under Chapter 17 or Chapter 61, a single fatal collision is but a single crime, regardless of the number of deaths resulting. *Myers II* rejected the argument and did an about face. After noting the legislature's enlargement of penalties for drunk driving deaths, Mr. Justice Neely said that "upon considering the matter in the present context, we conclude that we incorrectly interpreted the legislative intent in our negligent homicide statute and that the legislature

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<sup>37</sup> *Myers v. Murensky*, 245 S.E.2d 920 (W. Va. 1978).

<sup>38</sup> Justice McGraw noted that concerns about possible multiple jeopardy issues had influenced the decisions in some states. In his concurring opinion in the subsequent *State v. Myers*, 298 S.E.2d 813 (W. Va. 1982), he emphasized that the state constitutional rule barring multiple jeopardy did not bar multiple punishments for a single criminal transaction. *Id.* at 819.

<sup>39</sup> 259 S.E.2d 837 (W. Va. 1979).

<sup>40</sup> Only a syllabus point from the *Lough* case was noted, and it was promptly read "in light of" *State v. Lawson*. *Id.* at 839.

<sup>41</sup> 298 S.E.2d 813 (W. Va. 1982).

intended the punishment to reflect the gravity of the crime's consequences."<sup>42</sup> A concurring opinion by Justice McGraw, author of *Myers I*, also noted the changing legislative mood reflected in stiffer penalties for drunk driving. Mr. Justice Neely added a second rationale: Crimes against persons must be sternly treated.<sup>43</sup>

The driver who careens down a narrow, slippery highway at a high rate of speed, knowing the highway is regularly used by significant numbers of other vehicles, creates a blameworthy and unwarranted risk of death or serious injury to whomever and how-many-ever happen along. Such a driver should not be heard to complain that he is liable for two punishments if his conduct in fact kills two people. And if his conduct kills only one, the current punishment of the involuntary manslaughter statute seems inadequate in proportion to the levels of punishment for criminal offenses generally. Recognition of reckless manslaughter as generally the equivalent of voluntary manslaughter would provide a more rational adjustment than now occurs by the chance number of victims involved.

*State v. Kinney*,<sup>44</sup> the second of the trilogy of examples, involves a prosecution under the "malicious and unlawful assault" statute, an offense also commonly known as "wounding."<sup>45</sup> The offense requires an injury-in-fact accompanied by an intent to "maim, disfigure, disable or kill." The statute is a cumbersome response to problems long forgotten,<sup>46</sup> and could beneficially be abandoned for felony assault and battery provisions that could wisely employ the concept of recklessness. The facts of the *Kinney* case, as succinctly stated in the opinion, suggest the possibilities:

On the night of December 29, 1978, the appellant became involved in a "knock-down-and-drag-out" fight with one Sherry Kessell after she observed Kessell making love to her former boyfriend, Kenny Kimble. The appellant was beaten in that fight. After the fight Kimble observed the appellant in a phone booth, and she was very upset. Lumps had appeared on her head.

Sometime later the appellant reappeared at the apartment where the

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<sup>42</sup> *Id.* at 815. The reliance on legislative intent is troubling. The relevant intent was the intent of the legislature in 1951, when the negligent homicide statute was enacted, not the shifting attitude of the legislature in 1981 when penalties for drunk driving deaths were increased. Indeed, the culpable driving of Myers occurred in 1980, a year prior to the legislative action relied upon. Had the legislature expressly changed the negligent homicide statute in 1981 to provide enhanced penalties, it clearly could not have been applied to Myers' actions of the prior year.

<sup>43</sup> Justice Neely wrote, summarizing a position taken by Justice Miller in *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W. Va. 1980): "[I]t is consistent with the goals of our criminal justice system that both society as a whole and the relatives of the victims individually be able to attain some sense of vindication by punishing the appellant separately for each outrageous consequence of his negligent actions." 298 S.E.2d at 816.

<sup>44</sup> 286 S.E.2d 398 (W. Va. 1982).

<sup>45</sup> W. VA. CODE § 61-2-9(a) (Supp. 1983).

<sup>46</sup> Lorensen, *Aggravated Assaults in West Virginia*, 62 W. VA. L. REV. 319 (1960).



fight had occurred. Upon entering she observed Sherry Kessell sitting on Kenny Kimble's lap. She approached with a rifle raised to a horizontal position. Kimble, who later described the appellant as being in a wild state, grabbed the rifle and shoved it toward the floor. As this occurred, the rifle discharged. The bullet struck Sherry Kessell and caused a paralyzing injury.<sup>47</sup>

One fascinating sentence in this tragic description of facts could signal a difficult problem. This key sentence says: "As this occurred, the rifle discharged." The passivity of the expression may be mere style, but it may suggest that the facts are not all that clear as to whether the gun fired because of the intentional act of the defendant or because of an accidental or reflex action caused by the intervenor's shove. If the gun discharged because of reflex or accident, then the defendant's culpable act was the reckless and dangerous brandishing of the weapon. There is no difficulty finding a causal connection between defendant's act and victim's injury. Clearly, a jury could conclude that the defendant harbored the kind of intent described in the statute. The pieces seem to fit and the statutory elements appear to be met. Yet, is it not paradoxical that a person can accidentally do an act with specific intent? The result here seems not unreasonable because of the dreadful injury suffered by the victim. But that kind of harm, of course, is not necessary for the offense. All that the statute requires is that the victim suffer "physical harm."<sup>48</sup> This makes the intent element and its linkage to the act that causes the harm additionally important.<sup>49</sup> Had the intervenor Kimble been quicker to react, sending the intended victim sprawling, leaping to his feet and grabbing the gun before it could be fired, what then? Whether the defendant could be convicted under the statute would hinge upon the nice question of whether the intended victim suffered "bodily injury." A skinned knee or bloodied lip would probably suffice.<sup>50</sup> The defendant's act caused the intervenor to bump the intended victim, resulting in physical harm. Such a result is bizarre. It would be far more sensible to treat these two situations for what they are: The first (where the dreadful injury in fact occurs) would be deemed a serious assault because it involved either an intentional or a reckless discharge of a deadly weapon; the second (where the gun is wrenched away before a shot is fired) should be deemed an attempt. The reckless discharge of a deadly weapon in close proximity to others that results in injury should be treated as a serious offense.

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<sup>47</sup> 286 S.E.2d at 399.

<sup>48</sup> See Lorensen, *supra* note 46, at 323-24.

<sup>49</sup> Since causing any physical injury is sufficient to meet the demands of the offense, the intent element is critical to distinguish felony from misdemeanor batteries. In one clear misapplication of the statute, the court affirmed a conviction in *State v. Mowery*, 115 W. Va. 445, 176 S.E. 851 (1934). The defendant claimed that a piece of coal thrown at the victim was thrown in sport. The court ruled that an instruction offering that explanation was properly refused and noted the defendant was "presumed to intend the natural consequences of his act." The presumption instruction was held improper in *State v. Sacco*, 267 S.E.2d 193 (W. Va. 1980).

<sup>50</sup> See *supra* note 46.

Finally, recklessness has a role to play in rational assessment of bad check writers, though the concept has not found any recognition in the statutory law that has developed in the area.<sup>51</sup> The bad check writer who intends to take the money or goods obtained by the false check and never compensate the payee is surely as culpable as any person who obtains property by false pretense.<sup>52</sup> The deliberate use of the check to cheat should be treated as false pretense. But there are other bad check writers who do not fit neatly in this mold. They do not have a matured, deliberate intent to cheat at the time the check is written. The mental state of these offenders may be properly described as reckless. They utter a check with reckless disregard as to whether the payee will in fact be paid. Such check writers may be reckless with regard to the status of the checking account balance, or they may know there are insufficient funds then available to cover the check but vaguely hope to settle the debt at a later time in some manner.

The evolution of bad check laws did not adopt this kind of discrimination between bad check writers. The focus shifted rather to the question of whether the bad check writer promptly made good on the debt created by the check. The first statute enacted in West Virginia made payment of the bad check within twenty days of notice of dishonor an absolute defense.<sup>53</sup> In 1929, the effect of payment of the dishonored check was changed. The dishonor was statutorily made "prima facie evidence" of knowledge of the lack of adequate funds.<sup>54</sup> Prompt payment after dishonor dissipated this presumption. In 1977, there was a major overhaul of the bad check statutes triggered by the creation of the magistrate court system in the wake of the demise of the fee-paid justice of the peace system.<sup>55</sup> The 1977 law continued the "prima facie evidence" technique of the previous law.<sup>56</sup> Predictably, these statutory presumptions came under attack in the first appellate case dealing with the 1977 modifications, *State v. Griffith*,<sup>57</sup> which is the third case in the trilogy of recklessness exemplars.

The facts in *Griffith* were uncomplicated. About six months before

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<sup>51</sup> W. VA. CODE § 61-3-39 to 39h (Supp. 1983). More provisions, chiefly aimed at repeat offenders, were added in 1983 W. Va. Acts, ch. 55. These are now W. VA. CODE § 61-3-39(i) to (l) (Supp. 1983).

<sup>52</sup> *State v. Rutter*, 252 S.E.2d 899 (W. Va. 1979).

<sup>53</sup> 1922 W. Va. Acts, ch. 76.

<sup>54</sup> 1929 W. Va. Acts, ch. 41.

<sup>55</sup> 1977 W. Va. Acts, ch. 80 (codified at W. VA. CODE § 61-3-39 to 39(l) (Supp. 1983).

<sup>56</sup> W. VA. CODE § 61-3-39d(a) (Supp. 1983).

<sup>57</sup> 285 S.E.2d 469 (W. Va. 1981). In *Pinkerton v. Farr*, 220 S.E.2d 682 (W. Va. 1975), the court granted a prohibition against a prosecution under the "Red Man's Act," W. VA. CODE § 61-6-7 (1977), because the statute contained an unconstitutional presumption. The temptation remains to claim any prosecution under a statute containing an invalid presumption unconstitutional. The court made it clear in *State ex rel. Farely v. Wharton*, 267 S.E.2d 754 (W. Va. 1980), that the presence of an invalid presumption does not of itself make the entire statute void.

writing a check for 262 dollars worth of merchandise, defendant had opened a checking account with a deposit of 253 dollars. In the intervening months, the original deposit had been consumed by several withdrawals and the bank had closed the account as "overdrawn." This was the status of the account when the check which was the subject of the prosecution was presented. These matters were proved by bank ledgers and testimony that such account information had been mailed to the defendant. The defendant denied receiving the information and denied knowing the account was overdrawn at the time the subject check was written and delivered. Instructions given to the jury simply told them that they must find, in order to convict the defendant, that "'Carolyn Griffith knew' that there was not sufficient funds on deposit in or credit with such bank with which to pay the same upon presentation."<sup>58</sup> The instructions made no reference to the statutory provision that makes dishonor of the check "prima facie evidence" of the drawer's knowledge of insufficient funds.<sup>59</sup> The jury simply did not need the aid of a statutory rule to reach an appropriate conclusion about the defendant's knowledge at the time the check was uttered.

Let us suppose for a moment that through an act of beneficence of a friend, defendant Griffith had been able to come up with funds sufficient to make good on all outstanding checks. What then? According to the statute, the presumption would have been dissipated. Yet the conviction was obtained regardless of the presumption. Note that the presumption goes to the question of the defendant's knowledge of the inadequate funds. The effect of the payment seems to miss the mark. The defendant's knowledge of the state of the bank account would be the same, regardless of the subsequent making good of the checks. The real evil that is the target of the bad check laws is not just issuing a check "knowing there are insufficient funds." It is issuing a check with intent to cheat (false pretense) or with reckless disregard as to whether the payee will in fact be compensated. The presumption of knowledge of inadequate funds is really a step towards the conclusion that the worthless check writer intended to cheat the payee. The dissipation of the presumption by payment is probably more efficient as a collection tool than it is as a sorting mechanism to discriminate between honest errors and acts that undermine the vital reliability of the bank check system.

### CONCLUSION

A conscious acceptance of recklessness as the common mental state

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<sup>58</sup> 285 S.E.2d at 472 n.4.

<sup>59</sup> The defendant requested an instruction that would have told the jury that they could not presume defendant knew of inadequate funds from proof of the inadequate funds in the account. The court approved the trial court's rejection of the instruction on the ground that the elements of the offense were adequately covered by instructions stating the elements of the offense and the general burden of proof. *Id.* at 471 n.3, 472.

essential for criminal conduct could add a greater degree of rationality and consistency to the criminal law than presently exists. The failure of the criminal law revision in West Virginia means that the substantive law of this state will probably struggle along without recognition of the concept for the foreseeable future. The concept has utility. It deserves serious consideration.

